UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 91 (COUNCIL OF UTILITY CONTRACTORS, INC. AND VARIOUS OTHER EMPLOYERS)

and **Case 03-CB-163940**

FRANK S. MANTELL, an Individual

GENERAL COUNSEL'S ANSWERING BRIEF

I. PRELIMINARY STATEMENT AND FACTS

Administrative Law Judge (ALJ) Arthur J. Amchan issued a Decision and Recommended Order on September 7, 2016, finding that Respondent unlawfully removed Frank S. Mantell from its out-of-work referral list due to his protected activity. Respondent filed exceptions to the Decision and Recommended Order, and the General Counsel (GC) answers Respondent's Exceptions, herein.

The facts of the case are fully set forth in the ALJ's Decision at pages 1-3 (ALJD).[1] Briefly, the record evidence establishes and fully supports the ALJ's Decision that Respondent discriminated against Mantell in the operation of its non-exclusive hiring hall by removing him from its out-of-work referral list. The record demonstrates that Respondent discriminated against Mantell because he complained to and sought the support of his fellow Union members and the public concerning Respondent awarding a journeyman's book to a politician without requiring him to complete the apprenticeship program.

[1] References to the ALJ's Decision shall be designated as ALJD __: __ showing the page number first followed by the line numbers; to the Respondent's Brief as R. Br. p. __; to the transcript as Tr. __; to the General Counsel's Exhibits as GC Exh. __; and to the Respondent's Exhibits as R. Exh. __.

Mantell's posts enlightened Union members and the public that the Union's Business Agent, Richard Palladino, had bypassed the apprenticeship program in awarding the journeyman's book. The bypassed apprenticeship program lasts five years and culminates with apprentices earning their journeyman's books. The program requires members to work a certain number of hours and complete specific coursework. The apprentices are also required to attend Union meetings and volunteer their services. During their apprenticeship, members earn less than journeymen, but experience step increases in their wages. Other than the apprenticeship program, Respondent also allows key employees, who are employed by out-of-town contractors working locally, to purchase a journeyman's book. Awarding journeyman status affects the membership as there are more individuals available to perform the existing work leading to some members not working. (Tr. 30-33, 37, 175, 140, 214-215).

In the summer of 2015, Mantell learned that Palladino, Respondent's Business Agent, awarded a journeyman's book to Glenn Choolokian, a City of Niagara Falls Councilman, running in the Democratic primary for mayor. In June 2015, Mantell discussed Respondent issuing the journeyman's book with Dave Bellreng, Respondent's President, and three other Union members, Gordy Hadley, Jr., Mark Nicholson and Dwayne Corplinski. Their discussion occurred during break time while they were working at a landfill for the contractor Tug Hill. They talked about how awarding the book was wrong. (Tr. 34). Bellreng also told Mantell that it was Palladino's decision. In August, Mantell raised the issue again when he asked Billy [William] Grace, Respondent's Recording Secretary, why the Union's business agent gave Glenn Choolokian a journeyman's book. In response, Grace shrugged his shoulders and said that Dick's going to do what Dick's going to do and that he did not know about it until it was done.[2]

[2] Mantell's testimony concerning these conversations is unrebutted. Moreover, while Grace testified at the hearing he did not testify about this conversation.

Only after confirming this information with Respondent did Mantell take his appeals to Facebook; an action that led to Respondent punishing him. (Tr. 33-37, GC Exhs. 4, 5, and 6).

Palladino filed internal Union charges against Mantell because of his Facebook posts. Mantell learned about the charges on September 8, 2015 and around September 14, 2015, received a letter detailing those charges. Mantell was charged with violating the obligations of a member of the Union. However, it was not until the disciplinary hearing on October 5, 2015 that Mantell was presented with the evidence against him--three Facebook posts. Respondent's trial board found Mantell guilty of the charges; a finding approved by the required two thirds of Respondent's membership on October 12, 2015. According to Respondent's only witness, Billy Grace, a member of Respondent's trial board, Mantell was found guilty of the charges because of the Facebook posts. A finding Respondent did not except to. (ALJD 2-3, Tr. 38-44, 58, 62-63, 240-242, GC Exhs. 2-6, 9 and 10).

Facebook Posts

Mantell made his posts on a Facebook page he "friended" entitled "Niagara Falls Uncensored." Facebook recommended Mantell friend the page based on his associations. The page has about 4,000 participants, including Union members, such as Kevin Hasely, Pete Morreal, Mike Pitarresi and John Vivian. The page includes discussions about Niagara Falls government as well as discussions of Respondent. (Tr. 45-47, 93, 98-99, GC Exhs. 4-6).

Mantell's Post, GC Exhibit 4

Palladino presented Respondent's trial board with Mantell's post labeled with a "1." The post, as detailed below, comments on Choolokian receiving a journeymen's book while the apprentices have to work many hours and complete numerous classes for the same privilege. Several individuals including two Union members, Morreal and Pitarresi, participated in the discussion concerning Respondent's conduct. Significantly, Pitarresi expressed that he shares

Mantell's concerns. (Tr. 47, 53-54, 58, GC Exh. 4). Mantell's post, which generated 13 "likes," states:

> I want to ask everyone who is voting in the Democratic primary why councilman and mayoral candidate Choolokian received and accepted a journeyman union book through Laborers Local 91 when there are between 30 and 40 apprentices that have to work 4,000 hours and take approximately 20 classes to obtain that same journeyman book.

Pitarresi's reply, which has five "likes," states:

> I guess it just shows how corrupt our Union rally [sic] is. if true Frank? Which, I do not doubt, in the least! NO WAY IN HELL, IS THAT RIGHT! NO FRIGGIN WAY! I am not politically motivated what so ever. And have absolutely no horse in any political race. Local or National. But this is very troubling to me as a member of Local #91. Actually, way beyond, troubling. Way wrong, Way way wrong, if true! See how stupid it is already making our Union look just on a couple accurate comments here? (GC Exh. 4, p. 1-2).

Pitarresi also made the following additional comments:

- "Political and worse, Shenanigans!"(GC Exh. 4, p. 2)
- In response to a comment "I smell something fishy here" Pitaresi responded "YA THINK!!!!!!!!!" (GC Exh. 4, p. 2)
- "THE BA RESERVES THE RIGHT, TO DO WHATEVER THE F-K HE WANTS TO!" (GC Exh. 4, p. 2).
- "EMBARRASSING1" (GC Exh. 4, p. 2).

Also during the discussion, Union member Morreale commented:

> Frank, what are you trying to do here? How about a guy who has a full time job as a Firefighter but still is put to work, taking a job away from a person who doesn't have another full time job? (GC Exh. 4, p. 3).

Mantell's reply, which has four "likes," states:

> Sorry Pete Morreale, I am not running for mayor and receiving gifts from our union. I am just a voice in a rather dictatorship of a union. *And I am exposing [Palladino] for who and what he is. Our union deserves better*. (GC Exh. 4, p. 3 emphasis added).

Morreale responded:

> This is not the place for this Frank. We were 6 weeks away from closing our doors, which means your Dad, uncle, and the rest would have had their pension reduced to 41% along with 300 that would have been out of work. That is the truth and again this is not the place, so I'm done here. (GC Exh. 4, p. 3).

Mantell's received three "likes," in response when he stated:

> More of a reason not to give a journeyman union book to a politician when we have an apprenticeship program in place. *This kind of bad decision making does not help us in the eyes of the International*. (GC Exh. 4, p. 3 emphasis added).

In a continuation of the discussion, Union member Pitarresi wrote:

> C'mon Pete, Brolls that like? What ever goes on in the Union, Stays in the Union? Unfortunately? If this is true? It is or will be public knowledge soon! Personally as a highly paying dues member of Local #91, whom we all admit, has a history colorful history. I personally want to know more about Frank's allegation, or revelation? I will tell you one thing. Last night, when Frank posted this, I typed my comments above, about my Union and Glenn Choolookian [sic] etc. Obviously, if it was anyone else who was given a Journeymen's Union Book, at this particular time. It would not be as important, and questionable? …. (GC Exh. 4, p. 4).

Pitarresi's continues his comment stating:

> ... I am not grinding an axe here, personally. But something is way wrong. Unless a reasonable explanation is given? We workout [sic] in the public. I have no problem airing our dirty laundry out in public. Everyone on Earth, has dirty laundry! (GC Exh. 4, p. 4).

In addition to the comments detailed above, during the discussion, a non-union member named Robert Curtis stated "Never liked union, more corrupt than government!" (GC Exh. 4, p. 3). In response, Mantell defends the Union writing, "[i]t's not that we are corrupt. It's just that the leader of our union and our small 3 man PAC committee will back any politician who will promise benefits to us even though they are not always the best choice for our city or county." (GC Exh. 4, p. 3).

Vince Anello Post, GC Exhibit 5

At the disciplinary hearing, Palladino presented a Facebook post from the same site labeled "2." Former Niagara Falls mayor Vince Anello started the post about August 21, 2015, commenting that Choolokian refused to go on to his radio show. Mantell responded to the radio host's post and in a later comment announced that Respondent gave Choolokian a journeyman's book and completely ignored the apprenticeship program. Specifically, Mantell received one "like" when he stated:

> Hey Sam Archie [Choolokian's campaign manager], I recently heard that Glenn is a newly made member of Local 91. What a joke that is. He never worked construction. We have an apprenticeship program in place that my business agent completely ignored. And he gets a journeyman union book because he promises benefits to Local 91 if he becomes mayor???? (GC Exh. 5, p. 2, Tr. 57).

Mantell and Archie then engaged in a back-and-forth on Facebook with other individuals commenting as well. As part of the back-and-forth, Archie asked Mantell to speak with Palladino directly about his concerns and Mantell received two "likes" when he responded:

> I will at our next union meeting. I will also ask him how much $ was spent on our lawyers to fight those petitions. I will also ask him why he is so involved in Niagara Falls politics when his own lifetime residence of Lockport is barely looked at politically. I have lots of questions for him. But my question to you is still on the table as Glenn's political advisor, or manager, or whatever you are. Why is Glenn accepting a journey man union book from Local 91 with no construction experience? What favors is he promising Dickie if he wins mayor for his gift he received when 30 or 40 men and women have to go thru the apprenticeship? (GC Exh. 5, p. 3).

Archie asked Mantell about the favors he was alluding to in some of his posts, and Mantell responded, "Getting a journeyman union book. And you avoiding my question only confirms what I already know. Wink, wink, nod, nod kind of politics that all the voters should see for what it is." (GC Exh. 5, p. 4). Mantell then commented, "Are you or are you not going to disclose why this mayoral candidate received a journeyman book?" (Tr. 55- 58, 135, GC Exh. 5, p. 4).

Newspaper Post- GC Exhibit 6

Palladino's last piece of evidence presented to Respondent's trial board was a Facebook post labeled "3." In this post from late August 2015, Mantell publicized that the news media contacted him about Choolokian receiving a journeymen's book. (Tr. 58, 148, GC Exh. 6). Mantell's post states:

> I find it very status quo that the Reporter, or should I say the Rag, has not contacted me about Choolokian accepting the journeyman union book "gift" from my business agent Dick Palladino. The gazette and buff news both have. I read today's issue and I counted 6 different articles about 72nd st. But everyone knows the real reason they haven't contacted me – this "gift" is typical Niagara Falls bad politics and they can't exploit Glenn. The Reporter is trash, and anyone who actually reads it and thinks it's reliable and accurate are very ignorant of the real truth. (GC Exh. 6).

The 72nd Street referenced in the post refers to news reports about water lines freezing on the street. (Tr. 150-151). Mantell's post generated 26 "likes" and 4 comments.

Mantell's Conduct

Mantell criticized Respondent's actions and specifically those of its Business Agent, Palladino. Mantell had discussions with Union officials Grace and Bellreng, with the conversation with Bellreng including other Union members, because he did not think it was fair to all the other apprentices that Choolokian, a politician, was given a journeyman's book without having to go through the rigors of the apprenticeship program. (Tr. 37, 113, 146). Mantell's conversations with Union officials confirmed that Choolokian was given a book without being an apprentice. (Tr. 140-141). Mantell appealed to the public and other Union members through Facebook and the press because he wanted a lot of people to know that Choolokian got a journeyman's book without going through the apprenticeship program and that this conduct was wrong. (Tr. 98-99, 107). In discussing this conduct, Mantell referred to awarding Choolokian the status of a journeyman as a gift because he was able to bypass the apprenticeship program. (Tr. 151). Mantell was guided by the principle that people had a right to know what was happening. (Tr. 89).

Discipline

As a result of the posts, Respondent punished Mantell by removing him from its out-of-work referral list. Ever since becoming a member more than twenty years ago, Mantell obtained work by signing Respondent's out-of-work list. Mantell did not seek or obtain work by contacting employers directly. Thus, Mantell who signed the out-of-work list about September 22, 2015, was removed from the list by Respondent when he was found guilty of the charges against him. Respondent notified Mantell that he was found guilty of the charges by letter dated October 7, 2015 and he was notified that his punishment was effective October 7, 2015 in the minutes of the hearing. (GC Exhs. 9 and 10). Mantell was fined $5,000.00 and was suspended from the Union for 24 months. Mantell appealed Respondent's determination, which stayed his punishment. (Tr. 65, GC Exh. 11). In November 2015, Mantell attempted to sign the out-of-work list; however, Palladino told him that he was not going to be referred out for work until the International notified Respondent of the appeal. (Tr. 70). In a letter dated November 19, 2015, the International informed Mantell that his punishment was stayed because of his appeal. (GC Exh. 11). Less than a month later, the International, in a letter dated December 4, told Mantell the charges were dismissed. (GC Exh. 12). In mid-December 2015, Mantell returned to the out-of-work list when he signed it, however, at that point, he was much further down the list than when he signed it in September. (Tr. 68). By this point the working season was over, as it typically ends by Thanksgiving. (Tr. 30, 63-70, 72-75, 192, GC Exhs. 9, 10, 11 and 12).

II. THE JUDGE WAS CORRECT IN FINDING THAT MANTELL'S POSTS ARE PROTECTED. (EXCEPTION 1)

The ALJ correctly found that Mantell's posts are protected. (ALJD 3:29-36). Respondent challenges this finding by arguing the posts are unprotected because they concern the mayoral race, which completely ignores the clear wording of the posts which protest Respondent bypassing the apprenticeship program in awarding a journeyman's book to a

politician. (ALJD 3: 29-36, R. Br. p. 7-8, GC Exh. 4-6). As found by the ALJ, the issuance of the book to an apparently ineligible individual affected Mantell as one more journeyman impacts his employment opportunities. (ALJD 3:29-33). Mantell testified that additional journeymen have such an effect. (Tr. 33). Accordingly, employees seeking employment through the Respondent's hiring hall will face additional competition for journeymen positions if journeymen books are issued indiscriminately. Furthermore, Mantell's posts, in addition to advocating change, also express concern about an issue that affects other similarly situated union members who are journeymen as well as apprentices—that they will have to work with an inexperienced member who is untrained and therefore potentially unsafe on the job. Accordingly, the ALJ found that the posts concerned employees' terms and conditions of employment.

The ALJ further found that Mantell by making common cause with fellow employees was in engaged in protected activity. (ALJD 3:33-36). Mantell discussed Respondent's wrongdoing with Respondent officials and fellow Union members and thereafter publicized these concerns in his posts criticizing Respondent's running of the Union, in particular its business agent, in giving Choolokian a journeyman's book without having him complete the required apprenticeship program. Mantell's posts clearly indicate that Respondent's actions are inappropriate. Granting journeyman status to a person who has not participated in the apprenticeship program impacts the apprentices, who are forced to complete a rigorous program while earning lower wages. As noted above, it also impacts all members who will have to work with an ineligible member who is untrained and therefore potentially unsafe on the job and it creates more competition for journeymen positions. Mantell's criticism of Respondent invokes the mutual aid and protection of his fellow members and bears upon their interests as employees. See Office Employees, Local 251 (Sandia National Laboratories), 331 NLRB 1417, 1418-1419, 1424 (2000).

Furthermore, Mantell also makes common cause with fellow employees by criticizing the method in which Respondent operates the Union, which impacts all the member employees. Mantell's posts raise issues implicating the efficacy and fairness of Respondent's operations and procedures which impacts all Respondent's members. See e.g., International Brotherhood of Teamsters, Local 657 (Texia Productions, Inc.), 342 NLRB 637, 645 (2004) (the administrative law judge noting that regardless of whether a hiring hall is exclusive a union violates Section 8(b)(1)(A) of the Act when it discriminates against a member for his protected activity—criticizing a union official for the way he was doing his job); Plasterers Local 121, 264 NLRB 192 (1982) (individual's criticism of union leadership is protected by the Act); Laborers Local 836 (Corbet Const.), 307 NLRB 801, 803 (1992) (Administrative Law Judge Ricci stating, "that members have a statutory right to object to the way officers, or even a majority of the union members, chose to operate the union is so clear as to require no citation of authority."); see also, Longshoreman Local 20 (Ryan-Walsh Stevedoring Co.), 323 NLRB 1115, 1126 (1997) (the Board noting, "[t]he governing law is clear—a union violates Section 8(b)(1)(A) of the Act if it processes internal union charges against one of its members because that member engages in protected [dissent] union activity.").

The ALJ was also correct in finding that under Office Employees, Local 251 (Sandia National Laboratories), 331 NLRB 1417, 1418-1419, 1424 (2000), Respondent violated Section 8(b)(1)(A) of the Act. (ALJD 4: 1-14). Thus the ALJ found, contrary to any of Respondent's contentions that it is a purely internal union matter, that Respondent in removing Mantell from the out-of-work list impacted his employment relationship by depriving him of employment opportunities and prospective employers of his services. Respondent's conduct is therefore within the scope of and unlawful under Section 8(b)(1)(A) of the Act. Office Employees, Local 251 (Sandia National Laboratories), 331 NLRB 1417, 1418-1419, 1424 (2000) (stating that "Section 8(b)(1)(A)'s proper scope, in union discipline cases, is to proscribe union conduct

against union members that impacts on the employment relationship…."); see also International Brotherhood of Electrical Workers, Local 2321 (Verizon), 350 NLRB 258 (2007) (finding union discipline impacted the employment relationship where it resulted in less opportunity to work overtime). Here, Mantell obtained employment by signing the out-of-work list and his removal from that list denied him both employment and an opportunity for employment. Thus, what transpired is not a wholly intra-union matter.

Respondent is also wrong that Mantell's conduct does not bear some relation to the employees' interests as employees. As detailed above and found by the ALJ, Mantell's protest regarding Respondent's actions relates to employees' interests as employees for Respondent's conduct impacts journeyman through lost work opportunities. Furthermore, Mantell's actions lent support to his fellow employee-apprentices who must undergo a rigorous apprenticeship program while earning lower wages. Mantell's support of this cause is critical for if Mantell, who has been a member of the Union for almost a quarter of a century, was so severely punished, it's likely that an apprentice, as a new member, would be subject to even worse punishment. Mantell by expressing Respondent's conduct as wrong and needs to change, advocates concerning the fairness and efficacy of Respondent's operations and procedures which impacts all of Respondent's members, both as members and employees. Mantell's criticism of Respondent invokes the mutual aid and protections of his fellow members and bears upon their interests as employees.[3]

As Respondent's actions directly impacted Mantell's employment relationship, as found by the ALJ, they are proscribed by Sandia. (ALJD 4:1-14). International Brotherhood of Electrical Workers, Local 2321 (Verizon), 350 NLRB 258 (2007); see also, International Alliance of Theatrical Stage Employees (Freeman Decorating Service), 364 NLRB No. 81, slip

[3] In assessing this conduct Mantell's motive for taking action is not relevant. See Fresh & Easy Neighborhood Market, 361 NLRB No. 12, slip op. at 3 (2014).

op. 3 n. 2 (2016) (noting that under Sandia Section 8(b)(1)(A) proscribes union discipline that impacts the employment relationship in a case involving an exclusive hiring hall where members were suspended from being referred for work due to their absenteeism). The record fully supports the ALJ's findings that Respondent removed Mantell from the out-of-work list due to his posts, which are protected. By removing Mantell from the out-of-work list, Respondent interfered with the employee-employer relationship and therefore violated Section 8(b)(1)(A) of the Act under Sandia. (ALJD 4).

Implicit in the ALJ's findings of a violation is that the Respondent's interest in this matter did not outweigh Mantell's Section 7 rights. Under Board precedent, Mantell's Section 7 rights are balanced against the legitimacy of the Union's interest at stake. Service Employees Local 254 (Brandeis University), 332 NLRB 1118, 1120, 1122 (2000) (finding whether a violation occurred involves balancing the employees' Section 7 rights against the legitimacy of the union interest at issue); Steelworkers Local 9292 (Allied Signal Technical Services), 336 NLRB 52, 54 (2001) (noting that use of a balancing test is in accordance with "longstanding [Board] precedent"). Respondent identified its interest as its reputation --that it was attempting to distance itself from its reputation for corruption and these efforts were damaged by Mantell's posts claiming Respondent is corrupt. On this basis, Respondent contends that Mantell lost the protection of the Act. Respondent is wrong on both counts. Here, Mantell's Section 7 rights include his right to protest his and his fellow journeymen's loss of employment opportunities as well as to act in common cause with the apprentices who must complete a five year apprenticeship program that Respondent completely ignored by its actions. Moreover, Mantell also has a Section 7 right to criticize the way Respondent's official operates the Union, without it impacting his employment relationship. International Brotherhood of Teamsters, Local 657 (Texia Productions, Inc.), 342 NLRB 637, 645 (2004) (the administrative law judge noting that regardless of whether a hiring hall is exclusive a union violates Section 8(b)(1)(A) of the Act

when it discriminates against a member for his protected activity—criticizing a union official for the way he was doing his job); Plasterers Local 121, 264 NLRB 192 (1982) (individual's criticism of union leadership is protected by the Act); Laborers Local 836 (Corbet Const.), 307 NLRB 801, 803 (1992) (Administrative Law Judge Ricci stating, "that members have a statutory right to object to the way officers, or even a majority of the union members, chose to operate the union is so clear as to require no citation of authority."); see also, Longshoreman Local 20 (Ryan-Walsh Stevedoring Co.), 323 NLRB 1115, 1126 (1997) (the Board noting, "[t]he governing law is clear—a union violates Section 8(b)(1)(A) of the Act if it processes internal union charges against one of its members because that member engages in protected [dissent] union activity."). The right to press Respondent to change policies concerning the efficacy and fairness of its operations that impacts employee-members' employment opportunities and experiences clearly outweighs Respondent's nebulous claims that its reputation was damaged. See e.g., Sandia, 331 NLRB at 1424 (noting that Section 7 encompasses the right of employee-members to press the union to change its procedures where it bears some relation to their interest as employees); Service Employees Local 254 (Brandeis University), 332 NLRB 1118, 1122, n. 13 (2000) (noting Section 7 right to question adequacy of the union's representation of the bargaining unit). Furthermore, there was not one claim that Mantell's posts cost the Union a signatory contractor or a member. Accordingly, as found by the ALJ, Mantell's activity was protected.

III. THE JUDGE WAS CORRECT IN FINDING THAT THE POSTS WERE NOT MALICIOUSLY AND KNOWINGLY UNTRUE. (EXCEPTION 2)

The ALJ was also correct in finding that Mantell's posts were not malicious or knowingly untrue. (ALJD 3: 38-45 and n. 2). Accordingly, Respondent's argument to reopen the record to make such a showing is baseless. In making this argument, Respondent fails to identify any

evidence it was prevented from introducing that would actually demonstrate Mantell's statements were maliciously and knowingly untrue. Rather Respondent makes vague references to the nature of the posts or the context of the posts. (R. Br. p. 8-11). Respondent's inability to identify such evidence is due to the fact that the ALJ admitted evidence on both points. Clearly the nature of the posts is readily identifiably by the posts themselves which the ALJ most assuredly admitted into evidence. (GC Exhs. 4-6). As for the context of the posts, Respondent introduced testimony from both Mantell and its own witness Grace about the Union's checkered history. (Tr. 184, 220-221, 224-226). In this vein, the ALJ also admitted irrelevant information concerning Mantell's political leanings. (Tr. 80-85, 87-88). What Respondent cannot and did not establish is that Mantell's posts were malicious or knowingly untrue, as it did not seek to admit any evidence that Choolokain did not obtain a book or that he actually completed the apprenticeship program thereby earning a book. Respondent also did not seek to admit evidence demonstrating the reasons for allowing Choolokian to obtain a book.

The ALJ also thoroughly scrutinized Respondent's claims that Mantell lost the protection of the Act. The ALJ considered and rejected Respondent's contentions that Mantell by referring to Respondent's actions as being a gift or suggesting the Union awarded the book because it was promised benefits was maliciously and knowingly untrue. (ALJD 3: 41-45, n. 2). The ALJ found that, "Mantell's use of the term 'gift' can reasonably be interpreted as arguing that Choolokian was not entitled to a journeyman's book- an assertion that may or may not be true." (ALJD 3: 43-45, Tr. 151). Indeed Mantell testified that he referred to it as a gift because Choolokian did not go through the apprenticeship program—thus demonstrating that Choolokian is not entitled to the book. (Tr. 151). Respondent neither introduced any evidence that Choolokian attended or completed the apprenticeship program nor did it attempt to introduce such evidence. The ALJ also found that Mantell did not forfeit the protections of the Act by suggesting Respondent was promised benefits for awarding the book, as the record is devoid as

to the reasons Respondent allowed Choolokian to obtain a book. (ALJD 3:45, n. 2). The record demonstrates that at no point did Respondent attempt to explain why it gave Choolokian the book. The record is similarly devoid of the ALJ preventing Respondent from explaining its reason for allowing Choolokian to obtain a book. In fact, there was testimony by Mantell that William Grace, the only witness presented by Respondent, did not know why the book was awarded to Choolokian. (Tr. 37). Clearly, Respondent was not interested in providing a reason for its conduct and in fact deliberately shielded any such reasons from judicial scrutiny. Accordingly, Respondent was not prevented from introducing evidence concerning the reasons for its conduct. Furthermore, Respondent having failed to explain the reasons for its conduct is precluded from demonstrating that not only was Mantell aware of them (assuming the reasons were benign) he knowingly and maliciously disregarded them in his posts.

Furthermore, as found by the ALJ, Mantell's posts do not rise to the level of losing the protection of the Act. (ALJD 3:38-45). Under the standard established by NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard), 346 U.S. 464 (1953), and Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966), it is clear that Mantell's actions did not exceed the Act's protection. Under this standard the Board has held that "'employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection.'" MasTec Advanced Technologies, 357 NLRB 103, 107 (2011) (quoting Mountain Shadows Golf Resort, 330 NLRB 1238, 1240 (2000)). Respondent bears the burden of showing such malice, which it did not do. See Diamond Walnut Growers, 316 NLRB 36, 47 (1995).

Specifically, the ALJ correctly found that under MasTec Advanced Technologies, 357 NLRB 103, 107 (2011), Mantell did not lose the protection of the Act. (ALJD 3:38-41). In MasTec Advanced Technologies, 357 NLRB 103, 107 (2011), the Board instructed that

"[s]tatements are maliciously untrue and unprotected, 'if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. See e.g., TNT Logistics North America, Inc., 347 NLRB 568, 569 (2006), revd. sub nom. Jolliff v. NLRB, 513 F.3d 600 (6th Cir. 2008). The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue. See e.g., Sprint/United Management Co., 339 NLRB 1012, 1018 (2003).'"

Under this standard the Board extends broad protection to an individual's expressions to third parties, such as those made by Mantell. For example, in Jimmy Johns, 361 NLRB No. 27 (2014), the Board found employees that had been discharged and disciplined did not lose the protection of the Act where they publically distributed a poster that suggested eating a sandwich made by a sick employee could result in illness. Id. at *1. Specifically, the poster portrayed two sandwiches, one made by a healthy employee and the other by a sick employee and asked, "Can't Tell the Difference? That's too bad because Jimmy John's workers don't get paid sick days. Shoot, we can't even call in sick. We hope your immune system is ready because you are about to take the sandwich test . . . . Help Jimmy John's workers win sick days." In contrast, Mantell's statements are not nearly as suggestive or damaging.

Here, Mantell successfully generated interest with his appeals to third parties and Union members. In this regard, he received a number of responses, including responses from two Union members and numerous "likes." Significantly, the numerous "likes" demonstrate support for his posts. See Triple Play Sports Bar and Grille, 361 NLRB No. 31 (2014). Mantell was also contacted by the news media and shared the concerns of the members. In speaking to the news media, he continued to seek support by publicizing Respondent's activities.

Significantly, Mantell in his appeals did not make any statement that was untrue much less maliciously untrue. Moreover, it is Respondent's burden to demonstrate there was malice, which it cannot do. Mantell's testimony established that prior to publicizing Respondent's

conduct he confirmed that Choolokian received a journeyman's book with Respondent. It was on this basis he made his statements. Respondent did not present any evidence that belies Mantell's posts. Accordingly, as Respondent did not and cannot establish that Mantell's criticism of Respondent was maliciously untrue, he did not lose the protection of the Act.[4] Accordingly, the ALJ's finding is fully supported by the record and case law.

Furthermore, under a totality of the circumstances analysis, Mantell did not lose the protection of the Act. In this analysis the following factors have been considered: (1) whether there is a record of any animus; (2) whether Respondent provoked the discriminatee's conduct; (3) whether the conduct was impulsive or deliberate; (4) the location of the Facebook posts; (5) the subject matter of the posts; (6) nature of the posts; (7) whether the language used was considered offensive; (8) whether there was a specific rule prohibiting the language at issue; and (9) whether the discipline imposed was typically issued for similar violations or disproportionate to the offense. Pier Sixty, LLC, 362 NLRB No. 59, slip op. at 3 (March 31, 2015); see also, Triple Play Sports Bar & Grille, 361 NLRB No. 31 (2014). In applying these factors to the instant situation, it is clear that not one factor favors finding Mantell's conduct was so egregious that he lost the Act's protection. Here, Mantell's posts on a regional forum were protected, were not false or profane and yet generated unprecedented discipline.

As demonstrated above, Respondent's claims that it was precluded from introducing evidence that were relevant to this matter are baseless. The ALJ considered Respondent's claims concerning Mantell calling the awarding of the book a gift and that Respondent was promised benefits for awarding the book. The ALJ concluded that the record did not contain any reason or

[4] Furthermore, to the extent that the Board's analysis in Atlantic Steel Co., 245 NLRB 814 (1979) is applicable, Mantell did not lose the protection of the Act. Here, the discussion occurred at work and on Facebook. The posts concerned Respondent's operation of the Union, his expressions were not untruthful or profanity laden and while it was not provoked by an unfair labor practice it was based on wrongdoing. Id. at 816. Accordingly, all the applicable factors demonstrate that he did not lose the protection of the Act.

reasons explaining Respondent's actions in awarding the book and that referring to the book as a gift denotes that Choolokian may not be entitled to a book which may or may not be true. (ALJD 3:37-45). As the ALJ considered Respondent's claims and found them wanting, Respondent has retorted to claiming that the ALJ abused his discretion by not allowing non-relevant testimony. (R. Br. p. 9). The Board's Rules and Regulations, Section 102.35 provides, in pertinent part, that a judge should "regulate the course of the hearing" and "take any other action necessary" in furtherance of the judge's stated duties as authorized by the Board's Rules. Thus, the Board affords the judge significant discretion in controlling the hearing and directing the creation of the record. Turtle Bay Resorts, 353 NLRB 1242 (2009) affirmed and adopted, 355 NLRB 706 (2010); Parts Depot, Inc., 348 NLRB 152, 152 n. 6 (2006) (respondent failed to show judge's rulings resulted in prejudice or denial of due process). It is well established that the Board will affirm an evidentiary ruling of an administrative law judge unless that ruling constitutes abuse of discretion. 300 Exhibit Services & Event, Inc., 356 NLRB 415 n. 1 (2010); Aladdin Gaming, LLC, 345 NLRB 585, 587 (2005). As demonstrated throughout his decision and the record of the hearing, there is no evidence that the ALJ abused his discretion in any of his evidentiary rulings, including that involving witness' testimony, or ruling on objections. Accordingly, Respondent's attempt to reopen the record should be rejected.

IV. CONCLUSION

The ALJ's findings and conclusions are well-reasoned and supported by the record. The ALJD should be affirmed by the Board, and Respondent ordered to take the actions required in the ALJ's Recommended Order.

DATED at Buffalo, New York this 19th day of October, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on October 19, 2016, the following document was electronically filed with the National Labor Relations Board and copies were served on the following parties by electronic mail:

General Counsel's Answering Brief to Respondent's Exceptions

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